

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2092

SPONSOR: Judiciary Committee and Senators Villalobos and Smith

SUBJECT: Financial Protection for Elderly Persons

DATE: April 20, 2004

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Parham</u>	<u>Wilson</u>	<u>HC</u>	<u>Fav/2 amendments</u>
3.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
4.	_____	_____	<u>ACJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

## I. Summary:

CS for SB 2092 creates the Financial Protection for the Elderly Act. The measure provides a statutory cause of action for any person over age 60, defined as an “elderly person,” against a financial institution due to the financial exploitation of that person by such institution. An elderly person may recover civil damages, including attorneys fees and costs, plus punitive damages which are capped at \$1 million. The bill defines financial exploitation to mean obtaining or using an elderly person’s moneys, funds, assets, or property by deception, intimidation, or by unfair or unconscionable acts or practices.

The bill also authorizes the Attorney General to investigate and file civil actions in cases of financial exploitation against an elderly person. Funding for the Elder Victims Trust Fund, created under separate legislation,<sup>1</sup> includes one-half of all punitive damages awarded and moneys received by the Attorney General for attorney’s fees and costs of investigation or litigation under this authority.

The bill requires the Department of Elderly Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly.

The bill creates the following sections of the Florida Statutes: 410.701, 410.702, 410.703, 410.704, and 410.705.

The bill creates an undesignated section of law.

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<sup>1</sup> SB 2090 creates the Elder Victims Trust Fund.

## II. Present Situation:

### Adult Protective Services

The Department of Children and Family Services, (DCF or department) Adult Protective Services (APS) program, mandated by ch. 415, F.S., is a system of specialized social services directed toward protecting vulnerable adults who are unable to manage their own affairs, from further occurrences of abuse, neglect, or exploitation.<sup>2</sup> Assessment of an individual's need for protective services is initiated in response to a reported allegation of abuse, neglect, or exploitation. The four components of APS are:

- The on-site investigation of all reports of alleged abuse, neglect, or exploitation;
- Determination of immediate risk to the vulnerable adult and the provision of necessary emergency services;
- Evaluation of the need for and provision of on-going protective supervision; and
- Provision or arrangement of on-going protective services.

The department also administers the Florida Abuse Hotline in Tallahassee to receive reports alleging abuse, neglect, or exploitation of any vulnerable adult. Program services are provided locally through the department's 15 service district offices district staff conduct adult protective investigations and provide case management and referral services for adult abuse victims.

The DCF collects statistical data on complaints of exploitation which are reported annually. The agency database tracks complaints for "maltreatments or exploitation." However, the database does not currently collect information specific to financial exploitation. The total number of complaints received by DCF related to "maltreatments or exploitation" requiring investigation in

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<sup>2</sup> Federal definitions of elder abuse, neglect, and exploitation appeared for the first time in the 1987 Amendments to the Older Americans Act. These definitions were provided in the law only as guidelines for identifying the problems, and not for enforcement purposes. Currently, elder abuse is defined by state laws, and state definitions vary considerably from one jurisdiction to another in terms of what constitutes the abuse, neglect, or exploitation of the elderly. Broadly defined, however, there are three basic categories of elder abuse: (1) domestic elder abuse; (2) institutional elder abuse; and (3) self-neglect or self-abuse. In most cases, state statutes addressing elder abuse provide the definitions of these different categories of elder abuse, with varying degrees of specificity. Domestic and institutional elder abuse may be further categorized as follows:

- Physical abuse is defined as the use of physical force that may result in bodily injury, physical pain, or impairment.
- Sexual abuse is defined as non-consensual sexual contact of any kind with an elderly or disabled person or with any person incapable of giving consent.
- Emotional or psychological abuse is defined as the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment.
- Neglect is defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (e.g., pay for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care.
- Exploitation is defined as misusing the resources of an elderly or disabled person for personal or monetary benefit. This includes taking Social Security or SSI (Supplemental Security Income) checks, abusing a joint checking account, and taking property and other resources.

fiscal year 2002-2003 was 9,230. The chart below reports the numbers by each exploitation category.

Type of Exploitation	Verified	Some Indication	No Indication
Obtains or uses by Deception/Intimidation	618	1142	4532
Endeavors to obtain or use by Deception/Intimidation	79	177	910
When Victim Lacks Capacity	218	284	1194

Source: DCF, March 26, 2004.

The National Center on Elder Abuse (NCEA) is the major source of available statistics on elder abuse, neglect, and exploitation in the U.S. NCEA collects and analyzes national data on cases referred to and investigated by adult protective services, and serves as a resource to investigators worldwide. The 1998 National Elder Abuse Incidence Study<sup>3</sup> ranked, in order of frequency, the types of elder mistreatment:

1. Neglect;
2. Emotional/Psychological Abuse;
3. Physical Abuse;
4. Financial/Material Exploitation; and
5. Abandonment.

**Protection Against Financial Abuse and Neglect of Adults**

Various Florida statutes provide protection to elderly persons against specified financial abuse and exploitation. Under ch. 415, F.S., a person defined as a “vulnerable adult” may file a civil cause of action and recover actual and punitive damages, reasonable attorney’s fees, and costs for specified acts of financial exploitation.<sup>4</sup> The action may be brought by the adult, that person’s guardian, by an organization acting on behalf of the adult, or the personal representative of the estate of the deceased adult. Victims over the age of 65 may move the court to advance the trial on the docket. In order to seek relief, however, the victim must suffer from the infirmities of aging.<sup>5</sup> Section 415.102(7), F.S., defines “exploitation” to mean a person who:

- Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s

<sup>3</sup> National Center on Elder Abuse. September 1998. *National Elder Abuse Incidence Study: Final Report*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families and Administration on Aging.

<sup>4</sup> Section 415.1115, F.S.

<sup>5</sup> A “vulnerable adult is defined as someone who is 18 years old or older, and whose ability to perform normal activities is impaired because of a mental, emotional, long-term physical or developmental disability or dysfunctioning, brain damage or the infirmities of aging. In 2000, the terms “elderly persons and disabled adult” were uniformly replaced with the term “vulnerable adult” in ch. 415, F.S. See s. 415.102(26), F.S.

funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or

- Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

“Exploitation” may include, but is not limited to:

- Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
- Unauthorized taking of personal assets;
- Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
- Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

Chapter 825, F.S., governs criminal actions pertaining to the abuse, neglect, and exploitation of elderly persons and disabled adults relating to their funds, assets, or property. Under the chapter, an elderly person is someone who is 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age, organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that such person is impaired.<sup>6</sup> A disabled adult is a person 18 years of age or older who suffers from a condition of physical or mental incapacitation. Section 825.103, F.S., provides various criminal penalties against those persons convicted of financially abusing elderly persons and disabled adults and defines exploitation as:

- Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's...funds, assets, or property with the intent to temporarily or permanently deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who:
  - Stands in a position of trust and confidence with the elderly person or disabled adult; or
  - Has a business relationship with the elderly person or disabled adult.
- Obtaining or using...an elderly person's...funds, assets, or property with the intent to...deprive the elderly person...of the use, benefit, or possession of the funds, assets, or property...by a person who knows or reasonably should know that the elderly person...lacks the capacity to consent.

Under s. 825.103, F.S., the charge is a first degree felony for exploitation of an elderly person where the funds, assets, or property are valued at \$100,000 or more; a second degree felony

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<sup>6</sup> Chapter 812, F.S. and s. 825.101(5), F.S.

where funds are valued at between \$20,000 and less than \$100,000; and, a third degree felony where funds are valued at less than \$20,000.<sup>7</sup> Ignorance of a person's age is not a defense.<sup>8</sup>

Chapter 772, F.S., the Civil Remedies for Criminal Practices Act, creates a civil cause of action for violations of certain enumerated property, theft, or exploitation crimes.<sup>9</sup> However, these prohibited acts involve persons who possess criminal intent at the time of committing the financially-related crime.<sup>10</sup> Although punitive damages are not authorized under this section, a person who proves injury by clear and convincing evidence may recover up to three times actual damages caused.<sup>11</sup>

Under part II of ch. 501, F.S., the Florida Deceptive and Unfair Trade Practices Act (Act), a state attorney, or the Attorney General (if the violation affects more than one jurisdiction) may bring a civil action on behalf of a consumer<sup>12</sup> for a violation of the Act.<sup>13</sup> However, under s. 501.212, F.S., banks, savings and loan associations and insurance companies and other entities regulated by the Department of Financial Services, the Office of Insurance Regulation, and the Office of Financial Regulation are specifically exempt from the provisions of the Act.

Section 775.0844, F.S., known as the White Collar Crime Victim Protection Act, provides for criminal sanctions against those persons who deceive or cheat individuals out of their property. Section 812.0145, F.S., provides specific penalties for persons who are convicted of theft of more than \$1,000 from a person 65 years of age or older.

## **Financial Institutions**

### **Insurance Companies**

Pursuant to the Insurance Code,<sup>14</sup> insurers and insurance agents are regulated and subject to administrative oversight by the Office of Insurance Regulation (OIR) and the Department of Financial Services (DFS). Insurance companies and agents are specifically prohibited from engaging in specified unfair methods of competition and unfair or deceptive acts and practices under s. 626.9541, F.S. Twenty seven unfair acts are specified which include financial-related violations such as misrepresentation, false information, and advertising of insurance policies; unlawful rebates; unfair claim practices; twisting;<sup>15</sup> illegal dealings in premiums; collecting excess or reduced charges for insurance; insurance transactions through certain credit card

<sup>7</sup> Section 825.103(2), F.S.

<sup>8</sup> Section 825.104, F.S.

<sup>9</sup> Sections 772.103, 772.104, and 772.11, F.S.

<sup>10</sup> These crimes involve usurious practices, violations of the secure transactions act, unlawful telemarketing activities, illegal insurance transactions, and credit card crimes. (s. 772.102, F.S.).

<sup>11</sup> Section 772.104, F.S.

<sup>12</sup> Defined as an individual, firm, business, association, etc.

<sup>13</sup> Violations include any rule promulgated pursuant to the Federal Trade Commission (FTC) Act, 15 U.S.C., ss. 41 et seq.; any standards of unfairness and deception set forth by the FTC, and any rule, statute or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts.

<sup>14</sup> Chapters 624-632, 634, 635, 641, 642, 648, and 651, F.S.

<sup>15</sup> Twisting is knowingly making any misleading representations with respect to insurance policies for the purpose of inducing any person to forfeit, surrender, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

facilities; interlocking ownership and management of other insurers; sliding;<sup>16</sup> and, churning.<sup>17</sup> Insurers or agents engaging in such acts may be fined, depending on whether the act is nonwillful or willful, or otherwise sanctioned by the OIR. Harsher penalties could mean the insurer would suffer the loss of its certificate of authority to transact business in Florida, or the agent could lose his or her license.

Under ss. 626.989 and 626.9891, F.S., the Division of Insurance Fraud is afforded police powers to investigate insurers and agents who commit criminal violations pertaining to various crimes, including financial crimes, ranging from theft to insurance fraud. Insurance companies are also subject to market conduct examinations by the OIR which are thorough reviews of its records, accounts, documents, files and assets.<sup>18</sup> The OIR also contacts insurers, in specified cases, when the agency receives consumer complaints in order to insure the company responds appropriately.

Currently, any person may bring a civil action against an insurer for economic damages based upon the insurer's actions when the person is damaged by specific violations of the Insurance Code (which include financial related violations) or the commission of certain "bad faith" acts. Under the civil remedy<sup>19</sup> provision, a person may obtain damages, so-called "one-way" attorneys' fees, as well as costs, and, in certain cases, punitive damages.<sup>20</sup> These violations include acts related to unfair claim settlement practices, illegal dealing in premiums, excess or reduced charges for insurance, coercion of debtors, and when the insurer did not attempt in good faith to settle claims or failed to promptly settle claims when the obligation to settle such claims was clear. Persons may also bring a civil cause of action against insurers under their insurance policy or contract and if they prevail obtain one-way attorneys fees and enhanced attorneys fees.<sup>21</sup>

### **Banking Institutions**

Through the Office of Financial Regulation (OFR), state-chartered financial institutions are licensed, examined and regulated to ensure that private funds invested in Florida's state-chartered financial institutions are protected from potential loss due to failure or insolvency.<sup>22</sup> The OFR has regulatory authority over state-chartered commercial banks, credit unions, savings associations, nondeposit trust companies, international banking agencies, representative offices and administrative offices. Nationally or federally chartered financial institutions are chartered and regulated by various agencies of the federal government and OFR does not have regulatory

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<sup>16</sup> Sliding is representing to an applicant that a specific ancillary product is required or is included in the policy; or charging an applicant for an ancillary product in addition to the insurance coverage, without informed consent of the applicant.

<sup>17</sup> Churning is the practice whereby policy values in an existing life insurance policy are utilized to purchase another policy with that same insurer for the purpose of earning additional premiums, fees or commissions without a reasonable basis that the replacement will result in a actual benefit to the insured, in a fashion that is fraudulent when the applicant is not informed.

<sup>18</sup> s. 624.316, F.S. The OIR conducts market conduct examinations of domestic insurers once every 3 years.

<sup>19</sup> s. 624.155, F.S.

<sup>20</sup> Punitive damages may be obtained when the violations constitute a "general business practice" of the insurer. The one-way attorneys fees provision allows only insureds to be awarded attorneys fees if they prevail, but not insurers. Also, attorneys fees may be enhanced subject to the loadstar calculation and contingency risk multipliers. Loadstar is based on the number of hours reasonably expended by an attorney multiplied by an hourly rate. A contingency risk multiplier is a number (ranging from 1.0 to 2.5) which is applied to contingency fee or fee-authorizing statutory provisions. A court may add the multiplier to a fee based upon specified contingency risk factors or subtract the multiplier from a fee based on the results obtained. These factors are not authorized for the insurer's attorney if the insurer prevails in such litigation.

<sup>21</sup> s. 627.428, F.S.

<sup>22</sup> Ch. 658, F.S.

authority over those entities.<sup>23</sup> The agency processes all applications for new banks, savings associations, foreign banks, credit unions and trust companies. Applications for acquisitions, mergers, cross-industry conversions, changes of control, requests for trust powers and branches are also processed by OFR.

Under s. s. 415.1034(1)(a)8, F.S., banks are required to report cases of adult abuse, neglect, or exploitation to the Department of Children and Family Services (DCF). As noted above, “exploitation” includes unauthorized taking of personal assets, misappropriation or transfer of moneys belonging to a vulnerable adult. Specifically, banks, saving and loan, or credit union officer, trustee, or employee who knows, or has reasonable cause to suspect, that a vulnerable adult<sup>24</sup> has been or is being abused, neglected, or exploited must immediately report such knowledge or suspicion to the central abuse hotline of the DCF. The statute outlines the procedures and information which must be submitted to the agency.

### **Securities Regulation**

The Office of Financial Regulation (OFR) is also responsible for the enforcement of Chapter 517, F.S., the Florida Securities and Investor Protection Act (Act). The Act is designed to protect the investing public from investment and securities fraud while facilitating the efficient creation of capital. All applications to register securities for sale in Florida are reviewed to ensure that investors have access to full and fair disclosure of all relevant investment information and that the terms of the offering are “fair, just, and equitable” for the investor. The review is also conducted to determine if the business of the issuer is based on sound financial principles.

The Act requires that, in most instances, firms or individuals selling or offering to sell securities or offering investment advice in or from Florida must be registered. Dealers and investment advisers conducting business from a branch in Florida are required to register the location as a branch office. The OFR reviews firm and agent applications to ensure that unqualified firms and individuals are not allowed to conduct business in Florida. This review protects the investing public and the reputation of the industry.

The anti-fraud provisions of the Act make it unlawful for a person to engage in any fraudulent conduct when rendering investment advice or in connection with the offer, sale or purchase of any investment or security. Further, registrations of dealers, investment advisers, associated persons and branch offices may be denied, revoked, restricted or suspended. Such action may be taken if the registrant or applicant has violated any provision of the Act or any department rule, engaged in any fraudulent conduct, demonstrated unworthiness to transact business or is of bad business repute.

### **Privacy Issues**

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<sup>23</sup> To form a national bank, the organizing group must file an application with the Comptroller of the Currency. The Comptroller then reviews the application and, if all criteria are satisfied, issues the charter. National banks derive their basic powers from federal law (National Banking Act) while state bank operations are primarily outlined under ch. 658, F.S. However, there are exceptions. Where issues of national policy prevail, state banks must follow the relevant federal laws. Also, national banks may be subject to state statutes whenever federal law defers to state practices.

<sup>24</sup> See, footnote 5.

There are current federal laws which regulate the sharing of information by banks and other financial institutions. In 1999, the Gramm-Leach-Bliley Act<sup>25</sup> established a set of comprehensive privacy laws at the federal level applicable to any firm that provides financial services. The law:

- requires annual customer notification of privacy policies;
- allows customers to “opt-out” from having their information shared with third-parties;
- contains prohibitions on the disclosure of account information; and,
- sets regulatory standards to protect security and confidentiality.

The Fair Credit Reporting Act<sup>26</sup> gives consumers the ability to stop the sharing of credit application information or other personal information. The FCRA also gives consumers the power to stop unwanted credit solicitations. Under the Electronic Fund Transfer Act,<sup>27</sup> consumers must be informed of a financial institution’s information-sharing practices with regard to any electronic transaction, which includes virtually all checking, savings and other deposit accounts. The Right to Financial Privacy Act<sup>28</sup> protects consumer records maintained by financial institutions from improper disclosure to federal government officials or agencies. Also, the Telephone Consumer Protection Act<sup>29</sup> gives consumers the right under federal law to stop telemarketing calls from a particular company.

### **Consumer Protection**

There are a number of federal consumer protection regulations that detail particular protections and remedies pertaining to financial institutions. For example, the Federal Truth in Lending Act (TILA), 15 U.S.C. § 1601, et seq., (implemented in Regulation Z, 12 C.F.R. Part 226) places a regulatory burden on all creditors, including financial institutions, making loans for personal, family or household purposes. The law requires the lender to make specific, detailed and substantive disclosures of the information the consumer needs to make a wise credit choice. Those disclosures include the amount financed, the finance charge (the combination of all interest plus the additional fees and charges that are levied on a credit facility), and the annual percentage rate (the percentage rate yielded by dividing the total finance charge over the life of the loan). These disclosures must be set apart and clearly and conspicuously printed on the loan document.

The TILA imposes other limitations on specific types of loans that may be of particular value to the elderly. Certain “high interest” loans and reverse mortgages require particular disclosures so the consumer understands the transaction. These loans are also subject to specific fee limitations that keep lenders from overreaching. Creditors violating TILA can be compelled to make refunds or adjustments and if they knowingly and willfully provide false or inaccurate information or fail to provide required information, a creditor or potential creditor is subject to criminal liability.

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<sup>25</sup> The GLBA is under 15 U.S.C. 6801 et seq.

<sup>26</sup> The FCRA is under 15 U.S.C. 1681 et seq.

<sup>27</sup> The EFTA is under 15 U.S.C. 1693 et seq.

<sup>28</sup> The RFPA is under 15 U.S.C. 3401 et seq.

<sup>29</sup> The TCPA is under 15 U.S.C. 6501 et seq.

As to the issue of credit cards, section 15 U.S.C. § 1642, provides that “[n]o credit card shall be issued except in response to a request or application therefore. A consumer is protected from any liability for unauthorized use of the credit card that exceeds \$50.00. (15 U.S.C. § 1645.) The issuer of the credit card cannot impose any liability for unauthorized use of the credit card if the lender has not made specifically required disclosures regarding the potential liability and provided the card issuer gives the consumer notice of how to report lost or stolen credit cards.

If the consumer disputes a charge made on the card, and the card issuer (bank) fails to satisfactorily resolve the dispute, the consumer may assert against the card issuer all the claims (other than tort claims) and defenses arising out of the transaction and any claims arising out of the failure to satisfactorily resolve the dispute. (s. 12 C.F.R. § 226.12(c).

Under Florida law, ch. 737, F.S. (Trust Administration) and ch.733, F.S. (Administration of Estates) outline the duties and obligations of the financial institution to the extent not superceded by the trust document itself. Both statutory provisions provide for the personal liability of fiduciaries who fail to act appropriately in the fulfillment of their duties and attorneys’ fees may be awarded to the prevailing party. Florida law also requires financial institutions to maintain the confidentiality of books and records relating to customers. (s. 655.059, F.S.)

### **Arguments**

Proponents of this measure state that this bill is necessary because elderly persons are many times the victims of deceptive and unfair acts by certain financial institutions. Providing all such persons with a legal cause of action against these institutions (as opposed to limiting such actions only to adults who are infirm or mentally incapacitated, as is the current law) is critical in order for such persons to be compensated for their economic damages. Also, if the elderly person prevails, half of the punitive damages will be used to educate adults, law enforcement, and others as to financial exploitation of the elderly.

According to these proponents, some seniors say they were convinced to liquidate CDs, stocks, and savings accounts to fund annuities, for example, only to discover these actions were unfair and costly.<sup>30</sup> In one class action case recently, First USA Bank and its corporate parent, Bank One, were ordered to pay \$1.3 million to settle a lawsuit filed by 28 states and Puerto Rico, charging that the bank permitted telemarketing firms to use deceptive practices to obtain business from bank customers. Specifically, the banks provided customer lists and encrypted credit card numbers to telemarketing firms who then paid back a percentage of their sales to the banks.<sup>31</sup>

Financial institutions assert that they are already heavily regulated by a plethora of federal and state laws, noted above, which protect all persons from unfair and deceptive financial practices

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<sup>30</sup> One example concerned an 83-year old widow who confided her money worries to a teller at her local bank. The teller suggested she speak with their financial planner who persuaded the widow to move her funds (\$120,000) into variable annuities, which many experts suggest is extremely unsuitable for the elderly due to its exposure to stock-market risks and the heavy surrender penalties it imposes on cash withdrawals. Such annuities carry large commissions for those who sell them these proponents argue. Soon after putting her funds into these annuities, the value of the widow’s investments dropped by more than 20 percent.

<sup>31</sup> April 22, 2003, ConsumerAffairs.com.

by such institutions. Representatives with such institutions state that many of the terms of the bill are not defined, particularly the terms used in the definition of “financial exploitation,” including the words deception, intimidation, or unfair. The vagueness of these provisions could capture perfectly legitimate transactions, including repossessing a car for failure to pay, collecting on an overdrawn account, canceling an insurance policy for failure to pay premiums, or enforcing a past due loan contract.

### III. Effect of Proposed Changes:

In summary, this legislation provides many of the same remedies found in chs. 415 and 825, F.S., as outlined above in the Present Situation section. However, in this bill, a cause of action accrues to any adult over the age of 60, and it does not require the adult to be judged impaired from the infirmities of aging as contained in current law.

Under this bill and also in current law (in ch. 415, F.S.), if the elderly person prevails in their civil action against a person who engages in financial exploitation, the person is entitled to recover reasonable attorney’s fees and costs, and punitive damages. However, this bill caps a punitive award at \$1 million and provides that half of the award shall be deposited into the Elder Victims Trust Fund. These funds shall then be used to educate the elderly, law enforcement and others about financial exploitation of the elderly. This bill also allows the Attorney General to bring action against a person that has engaged in the financial exploitation of the elderly and provides criminal penalties similar to those found in ch. 825, F.S.

**Section 1.** Creates the “Financial Protection for the Elderly Act.”

**Section 2.** Creates s. 401.701, F.S., providing legislative intent. This section specifies that the Legislature recognizes that elderly persons are frequent victims of deceptive and unfair acts and business practices and are often unusually vulnerable to these acts. It is also the intent of the Legislature that these provisions are to be construed liberally to provide for the protection of elderly persons and to provide the elderly, both individually and collectively, with recourse from financial exploitation.

**Section 3.** Creates s. 401.702, F.S., to provide definitions specific to this act including the following terms:

- “deception” - means a false or misleading misrepresentation of material fact; or, an omission of material fact which fact is reasonably necessary in order to make the representations not misleading;
- “department” - Department of Elderly Affairs;
- “elderly person” - a person older than 60 years of age;
- “financial institution” - includes a bank, bank holding company, credit card bank, banking organization, savings association, trust company, credit union, investment company, insurance company, or money-market mutual fund;
- “financial exploitation” - is to obtain, or endeavor to obtain, an elderly person’s money, funds or property by deception or intimidation, or by unfair or unconscionable acts or practices. The term includes any act causing, bringing about, participating in, facilitating, counseling, or aiding or abetting financial exploitation of an elderly person;

- “intimidation” - means communication by word or act to an elderly person that he or she will be deprived of food, clothing, shelter, medicine, money, or financial support, or suffer physical violence;
- “obtains or uses” - means taking or exercising control over funds or assets; or, making use or transfer of funds or assets;
- “unconscionable”- must be determined by the court which must consider whether an act is unconscionable, including whether:
  1. the defendant took advantage of an elderly person’s inability to protect his or her interests because of mental or physical infirmity, ignorance, illiteracy, or inability to understand the language of an agreement;
  2. the elderly person was unable to materially benefit from the transaction;
  3. the defendant knew or should have known that there was no reasonable probability that the elderly person could pay a financial obligation;
  4. the defendant induced the elderly person into the transaction to the person’s detriment;
  5. the act or practice of the defendant shocks the conscience or offends public policy; or
  6. the defendant seeks a waiver of the rights and remedies under this bill.

**Section 4.** Creates s. 410.73, F.S., relating to civil actions against financial exploitation. This section declares financial exploitation of an elderly person by a financial institution unlawful and against public policy of the state. This section provides for a cause of action in a circuit court for an elderly person to obtain a declaratory judgment, without regard to any other remedy which an elderly person may be entitled, or to enjoin a violator of the provisions of this section.

This section provides that if an elderly person suffers injury or loss as a result of a violation of this section, he or she may bring an action for damages, including punitive damages. Prevailing plaintiffs may recover reasonable attorney’s fees and costs.

This section specifies that a guardian, family member, person, or organization acting on behalf of the elderly person with certain consent, or the personal representative, executor, or trustee is granted standing to sue if an elderly person is deceased, and that if the person dies, this does not cause the court to lose jurisdiction of any claim for relief under this section.

An elderly person is authorized to move the court to advance the trial on the docket, and the presiding judge may advance the trial, after considering the person’s age and health. The motion may be served with the civil complaint or at any point thereafter.

This section provides that the Attorney General is authorized to investigate, administer oaths, and subpoena witnesses, and to bring a civil action in circuit court to obtain a declaratory judgment or enjoin a violator, or for actual damages or restitution on behalf of an elderly person. Costs and fees will be awarded in prevailing cases to the Attorney General, to be deposited in the Elder Victims Trust Fund.

**Section 5.** Creates s. 410.704, F.S., relating to limitations on punitive damages. An award of punitive damages under this section may not exceed \$1 million. The \$1 million limitation does

not prohibit a court from exercising discretion in determining the adequacy of an award of punitive damages which is less than three times the amount of compensatory damages. The jury may not be told of the provisions of this section.

Despite any law to the contrary, the punitive damages awarded under this section are to be divided equally between the claimant and the Elder Victims Trust Fund as follows:

- The clerk of the court is required to transmit a copy of any verdict and final judgment providing for punitive damages under this section to the Chief Financial Officer by certified mail. The court is required to order the percentages of the punitive damages award, payable in equal divisions between the claimant and the Elder Victims Trust Fund.
- If a settlement agreement is entered into between the parties to the action after a jury verdict awarding punitive damages in an action brought under this section has been returned, the parties must provide for an equal share of the punitive damages payable to the Elder Victims Trust Fund and the claimant.
- The Department of Revenue is required to collect all punitive damages payable to the Elder Victims Trust Fund. Punitive damages are to be deposited in the Elder Victims Trust Fund. If the full amount of punitive damages cannot be collected, the claimant and the other recipients designated under this provision are each entitled to equal shares of the punitive damages collected.

**Section 6.** Creates s. 410.705, F.S., requiring the Department of Elder Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly. These groups must be informed of the provisions of this chapter, and other statutory provisions related to elder exploitation, and of the rights and remedies available to elderly individuals.

This section clarifies that these rights and remedies supplement those already in existence, except that punitive damages are recoverable only under this legislation or alternatively under ch. 772, F.S.

This section provides that lack of knowledge of an elderly person's age is not a defense. Any waiver by an elderly person of these rights is unenforceable and void.

**Section 7.** Provides that this act shall take effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, of the Florida Constitution.

##### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of s. 24(a) and (b), Art. I of the Florida Constitution.

C. Trust Funds Restrictions:

The elder victims trust fund may be created with the passage of SB 2090 by a three-fifths vote of the members of both houses of the Legislature.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Adults defined as elderly persons would benefit under the provisions of the bill because they could assert a cause of action against a financial institution and recover damages in financial exploitation actions.

Financial institutions, including insurance companies and banks, that engage in financial exploitation can be sued by elderly persons and the Attorney General under the bill's provisions. Declaratory judgments or injunctions can be brought as well. Specified punitive damages, capped at \$1 million, can be sought as well as attorney's fees and costs by the successful plaintiff.

Financial institutions could likely be very circumspect in dealing with elderly persons (defined as adults over 60 years of age) for fear that innocent transactions could subject them to financial liability. For example, conceivably a legitimate communication by a bank representative with an elderly person that a financial decision may result in the suffering of a financial loss may be considered "intimidation" or "unfair" and subject the bank to liability.

C. Government Sector Impact:

The bill requires the Department of Elderly Affairs to create statewide initiatives to educate the public, including the elderly, law enforcement, judiciary, and social service professionals of deceptive and unfair acts against the elderly. The bill does not clearly specify that the Elder Victims Trust Fund created in SB 2090 will be used to fund these initiatives and there is no way to estimate the amount of funds that will be deposited in the Elder Victims Trust Fund to be appropriated to the department for implementing these initiatives.

The new civil causes of action proposed under this bill should result in additional revenue generating to the state, due to an increase in filing fees. Under ch. 2003-402, L.O.F., filing fee revenue is directed to the General Revenue Fund, the Clerk of Courts Operations Conference, the Court Education Trust Fund, and the Clerks of Court Trust Fund, effective July 1, 2004.

The bill also provides that half of punitive damage awards, as well as litigation costs and attorney's fee awards received by the Attorney General, shall be deposited into the Elder Victims Trust Fund.

Given the state's large elderly population, this bill potentially has a notable fiscal impact on judicial workload, particularly related to expedited circuit proceedings. This bill may increase due process costs for the state. Under ch. 2003-402, L.O.F., certain due process services that are being transferred from the counties to the state including costs for conflict counsel, court reporting, interpreting, auxiliary aids or services, and expert witness fees.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Section 4 of the bill specifies that a guardian, family member, person, or organization acting on behalf of the elderly person with certain consent, or the personal representative, executor, or trustee is granted standing to sue if an elderly person is deceased. It is uncertain who will have priority standing to sue in the event of an elderly person's death.

**VIII. Amendments:**

#1 by Health, Aging, and Long-Term Care:

Deletes the word "unconscionable" from the definitions section of the bill.

#2 by Health, Aging, and Long-Term Care:

Clarifies that funds from the Elder Victims Trust Fund can be used to pay for the education initiatives that the Department of Elder Affairs must implement under the bill.